Sime Darby Ara Damansara Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-14–49–10 OF 2020
NOORIN BADARUDDIN J
15 NOVEMBER 2022

Revenue Law — Income tax — Refund of tax paid under mistake — Director-General of Inland Revenue issued decision impact statement ('DIS') disagreeing with Court of Appeal's decision that gains arising from compulsory acquisition of land were not taxable — Taxpayer followed DIS and paid tax on its gains but later realised opinion expressed in DIS was contrary to the law — Taxpayer applied for refund of tax mistakenly paid by reliance on DIS but Revenue rejected application — Special Commissioners of Income Tax ('SCIT') by majority upheld Revenue's decision on appeal — Whether SCIT and Revenue had acted in blatant disregard of binding superior court decisions and misinterpreted s 131(4) of Income Tax Act 1967 ('the ITA') to deny taxpayer of refund — Whether Revenue had acted arbitrarily, inconsistently and mala fide to mislead taxpayer and deny it of its rights — Whether Revenue would be unjustly enriched if tax paid under mistake was not refunded — Whether Director-General's DIS was illegal and invalid as he had no power to issue DIS under the ITA

Following the compulsory acquisition of three of its lands by the Selangor State Government in 2009–2010, the appellant pondered whether it should pay tax on the approximately RM33.95m in gains it had made from the compensation it received in respect of the lands. The appellant's dilemma was whether to follow the decision of the Court of Appeal ('COA') in *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd and another appeal* [2006] 3 MLJ 597 ('Penang Realty') which held that tax was not payable on gains arising from compulsory acquisition of land, or whether to follow the respondent's decision impact statement ('DIS') issued in early 2007 wherein the respondent disagreed with the Penang Realty decision and took the view that tax was still payable on the gains by virtue of s 24(1)(a) of the Income Tax Act 1967 ('the ITA') which provision the COA had not considered in *Penang Realty*. The appellant decided to follow the DIS and computed the tax payable on the gains to be RM8,488,375 and paid the same for the Year of Assessment 2010 ('YA 2010'). In the later part of 2011, the appellant became aware that both the High Court, at first instance, and the COA, on appeal, had not only upheld the *Penang Realty* decision in the case of *Metacorp Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2011] 5 MLJ 447 ('Metacorp') but had also held that there was no need for the court in *Penang Realty* to have considered s 24(1)(a) of the ITA as it had no application in that case. When the Federal

Court declined to grant the respondent leave to appeal against the *Metacorp* decision, the appellant realised it had made a mistake by relying upon the respondent's opinion in the DIS. The appellant applied to the respondent for relief under s 131 of the ITA to obtain a refund of the RM8,488,375 tax it had mistakenly paid. The respondent rejected the s 131 application on the ground, inter alia, that there was no mistake when the appellant submitted its tax returns for YA 2010 based on the DIS because what was expressed in the DIS about s 24(1)(a) of the ITA was the respondent's 'generally prevailing practice' at the time. The appellant was informed that if it was unhappy with the respondent's decision, it could appeal to the Special Commissioners of Income Tax ('SCIT') pursuant to s 131(5)(a) of the ITA. The appellant appealed as advised. In a majority decision, the SCIT rejected the appellant's appeal for the same reasons given by the respondent. In the instant appeal, the appellant submitted that the SCIT's majority decision was perverse and bad in law because the respondent had clearly refused to abide by the binding decisions of the Superior Courts in the *Penang Realty* and *Metacorp* cases and was acting unconscionably in refusing to refund the RM8,488,375. The appellant submitted that nothing in the ITA empowered the respondent to issue a DIS which, in the present case, had only served to confuse and mislead taxpayers into believing that the law was other than what was established in *Penang Realty* and *Metacorp*.

Held, allowing the appeal:

(1) The respondent in defiance of the doctrine of judicial precedent had wrongly used s 131(4) of the ITA to override and disregard binding Superior Court decisions and had deprived the appellant of the overpaid tax of RM8,488,375. The respondent had wrongly treated the DIS as falling within the meaning of a 'practice of the Director-General generally prevailing' under s 131(4) of the ITA when no evidence of such practice existed prior to and/or at the material time. The fact that Parliament only allowed the respondent to issue Public Rulings under the law, any practice of the respondent to be applied or which was 'generally prevailing' could only be made by such mode. However, instead of using the allowed and defined route, the respondent decided to create a 'creature' called DIS which was illegal and misleading (see para 85).

(2) The respondent had acted in bad faith by resorting to various procedural means to deny the appellant of its entitlement under s 131(1) of the ITA. The respondent's interpretation of s 131(4) of the ITA was far from being logical and rational as there could not be a 'generally prevailing practice' that was contrary to the law (see para 86).

(3) Before this court, the respondent came up with the argument that the appellant should have resorted to the appeal provisions in s 99 of the ITA. The appeal provisions under ss 99–102 of the ITA related to an appeal by

a taxpayer aggrieved by the assessment made by the respondent. But that was not the case here. The appellant was not aggrieved with the respondent's assessment but with its own mistake when making the self-assessment in its tax returns. It was to address that situation that Parliament enacted s 131 of the ITA to enable taxpayers to get back the tax they had mistakenly paid (see paras 27–29).

(4) The respondent failed to prove that in YA 2010, there was a 'general prevailing practice of the Director-General' to subject the gains arising from compulsory acquisition of land to income tax and that the appellant's tax return for YA 2010 was in fact made in accordance with that 'generally prevailing practice' and not in reliance on anything else. In its decision, the SCIT made no finding of fact that any such 'generally prevailing practice' on the part of the respondent existed when the appellant's tax return for YA 2010 was filed. The DIS was merely the respondent's view of the decision in Penang Realty and could not constitute the 'practice of the Director-General generally prevailing' under s 131(4) of the ITA. Even if there was such a practice, it could not be contrary to the law as that would defeat art 96 of the Federal Constitution which stated that no tax shall be levied other than through the Federal Law. The respondent could not have a practice that was contrary to the ITA which was a Federal Law. Neither could any purported 'generally prevailing practice' of the respondent override or defeat binding Superior Court decisions (see paras 32, 34–35, 43 & 47).

(5) The DIS issued by the respondent was illegal and invalid in law. The respondent had no power to issue the DIS under the ITA. The ITA only empowered the respondent to issue Public Rulings under s 138A of the ITA on the application of any provision of the ITA in relation to any person or class of persons or any type of arrangement (see paras 36 & 38).

(6) There was no necessity at all for the COA in *Penang Realty* to have considered s 24(1)(a) of the ITA. The respondent's position in the DIS was erroneous and unnecessary. The DIS disregarded judicial precedent and caused untold confusion to taxpayers and good corporate citizens as it had put taxpayers in a position of conflict between the respondent and what they thought they understood of *Penang Realty* (see paras 21–23 & 54).

(7) The introduction of a new s 4C into the ITA which took effect from YA 2014 onwards required taxpayers to bring their gains arising from the compulsory acquisition of land to tax under the ITA. The amendment reversed the decisions in *Penang Realty* and *Metacorp* from YA 2014 onwards. But it showed that the decisions in those cases represented the correct law prior to YA 2014. The amendment was thus fatal to the respondent's stand in the instant appeals (see para 61).

(8) The majority of the SCIT came to a perverse decision in holding that the respondent could deny the appellant relief under s 131 of the ITA even if it contradicted the binding decisions of the Superior Courts in *Penang Realty* and *Metacorp* and violated the doctrine of judicial precedent. The appellant was clearly entitled to the relief sought under s 131(1) for to hold otherwise would tantamount to allowing the respondent to be unjustly enriched (see paras 79–80 & 82).

[Bahasa Malaysia summary

Berikutan pengambilalihan wajib tiga keping tanahnya oleh Kerajaan Negeri Selangor pada tahun 2009–2010, perayu memikirkan sama ada ia perlu membayar cukai ke atas kira-kira RM33.95 juta keuntungan yang diperoleh daripada pampasan yang diterimanya berhubung tanah tersebut. Dilema perayu adalah sama ada untuk mengikut keputusan Mahkamah Rayuan ('MR') dalam *Ketua Pengarah Hasil Dalam Negeri lwn Penang Realty Sdn Bhd dan satu lagi rayuan* [2006] 3 MLJ 597 ('Penang Realty') yang memutuskan bahawa cukai adalah tidak perlu dibayar atas keuntungan yang timbul daripada pengambilan tanah secara wajib, atau sama ada untuk mengikuti decision impact statement ('DIS') responden yang dikeluarkan pada awal tahun 2007 di mana responden tidak bersetuju dengan keputusan *Penang Realty* dan berpandangan bahawa cukai masih perlu dibayar ke atas keuntungan tersebut menurut s 24(1)(a) Akta Cukai Pendapatan 1967 ('ACP') yang mana peruntukan yang tidak dipertimbangkan MR dalam *Penang Realty*. Perayu memutuskan untuk mengikuti DIS dan mengira cukai yang perlu dibayar ke atas keuntungan adalah RM8,488,375 dan membayarnya untuk Tahun Taksiran 2010 ('YA 2010'). Pada akhir tahun 2011, perayu menyedari bahawa kedua-dua Mahkamah Tinggi, pada mulanya, dan MR, semasa rayuan, bukan sahaja mengekalkan keputusan *Penang Realty* dalam kes *Metacorp Development Sdn Bhd lwn Ketua Pengarah Hasil Dalam Negeri* [2011] 5 MLJ 447 ('Metacorp') tetapi juga telah memutuskan bahawa tidak ada keperluan untuk mahkamah di *Penang Realty* untuk menimbangkan s 24(1)(a) ACP kerana ia tidak terpakai dalam kes tersebut. Apabila Mahkamah Persekutuan enggan memberikan kebenaran responden untuk merayu terhadap keputusan *Metacorp*, perayu menyedari ia telah membuat kesilapan dengan bergantung kepada pendapat responden dalam DIS. Perayu memohon kepada responden untuk relif di bawah s 131 ACP untuk mendapatkan bayaran balik sebanyak RM8,488,375 cukai yang telah tersalah bayar. Responden menolak permohonan s 131 atas alasan, antara lain, bahawa tidak ada kesilapan apabila perayu mengemukakan penyata cukainya untuk YA 2010 berdasarkan DIS kerana apa yang dinyatakan dalam DIS mengenai s 24(1)(a) ACP adalah 'amalan am' responden pada masa tersebut. Perayu dimaklumkan bahawa jika ia tidak berpuas hati dengan keputusan responden, ia boleh merayu kepada Pesuruhjaya Khas Cukai Pendapatan ('SCIT') menurut s 131(5)(a) ACP. Perayu merayu seperti yang dinasihatkan. Berdasarkan keputusan majoriti, SCIT menolak rayuan perayu atas alasan yang sama yang diberikan oleh

responden. Dalam rayuan semasa, perayu berhujah bahawa keputusan majoriti SCIT adalah salah dan teruk berdasarkan undang-undang kerana responden jelas enggan mematuhi keputusan mengikat Mahkamah Tinggi dalam kes *Penang Realty* dan *Metacorp* dan bertindak tidak wajar dalam enggan membayar balik RM8,488,375. Perayu berhujah bahawa tiada apa-apa pun dalam ACP yang memberi kuasa kepada responden untuk mengeluarkan DIS yang, dalam kes semasa, hanya mengelirukan pembayar cukai untuk mempercayai bahawa undang-undang tersebut adalah selain daripada apa yang diputuskan dalam *Penang Realty* dan *Metacorp*.

Diputuskan, membenarkan rayuan:

(1) Responden dalam mengingkari doktrin duluan kehakiman telah tersalah menggunakan s 131(4) ACP untuk mengetepikan dan tidak mengambil kira keputusan Mahkamah Tinggi yang mengikat dan telah menghalang perayu daripada cukai terlebih bayar sebanyak RM8,488,375. Responden telah tersilap menganggap DIS sebagai dalam pengertian 'amalan Ketua Pengarah secara amnya' di bawah s 131(4) ACP apabila tiada keterangan amalan sedemikian wujud sebelum dan/atau pada masa yang material. Fakta bahawa Parlimen hanya membenarkan responden mengeluarkan Ketetapan Umum di bawah undang-undang, apa-apa amalan responden untuk digunakan atau yang 'biasanya' hanya boleh dibuat dengan cara sedemikian. Walau bagaimanapun, daripada menggunakan laluan yang dibenarkan dan ditetapkan, responden memutuskan untuk mencipta 'makhluk' yang dipanggil DIS yang menyalahi undang-undang dan mengelirukan (lihat perenggan 85).

(2) Responden telah bertindak tanpa suci hati dengan menggunakan pelbagai cara prosedur untuk menafikan perayu kelayakannya di bawah s 131(1) ACP. Tafsiran responden terhadap s 131(4) ACP adalah jauh daripada logik dan rasional kerana tidak boleh ada 'amalan am' yang bertentangan dengan undang-undang (lihat perenggan 86).

(3) Di hadapan mahkamah ini, responden mengemukakan hujah bahawa perayu sepatutnya menggunakan peruntukan rayuan dalam s 99 ACP. Peruntukan rayuan di bawah ss 99–102 ACP berkaitan rayuan oleh pembayar cukai yang terkilan dengan taksiran yang dibuat oleh responden. Tetapi ianya tidak berlaku di sini. Perayu tidak terkilan dengan taksiran responden tetapi dengan kesilapan sendiri semasa membuat taksiran sendiri dalam penyata cukainya. Bagi menangani situasi tersebut, Parlimen menggubal s 131 ACP untuk membolehkan pembayar cukai mendapatkan semula cukai yang telah mereka silap bayar (lihat perenggan 27–29).

(4) Responden gagal membuktikan bahawa dalam YA 2010, terdapat 'amalan am Ketua Pengarah' yang tertakluk kepada cukai pendapatan dan bahawa penyata cukai perayu untuk YA 2010 adalah dalam fakta

yang dibuat mengikut 'amalan am' tersebut dan tidak bergantung kepada perkara lain. Dalam keputusannya, SCIT tidak membuat dapatan fakta bahawa apa-apa 'amalan am' sedemikian di pihak responden wujud apabila penyata cukai perayu untuk YA 2010 difailkan. DIS hanyalah pandangan responden mengenai keputusan dalam Penang Realty dan tidak boleh membentuk 'amalan Ketua Pengarah secara amnya' di bawah s 131(4) ACP. Sekiranya terdapat amalan sedemikian, ia tidak boleh bertentangan dengan undang-undang kerana ia akan mengalahkan perkara 96 Perlembagaan Persekutuan yang menyatakan bahawa tiada cukai boleh dikenakan selain melalui Undang-Undang Persekutuan. Responden tidak boleh mempunyai amalan yang bertentangan dengan ACP yang merupakan Undang-Undang Persekutuan. Begitu juga yang dikatakan sebagai 'amalan am' responden tidak boleh mengatasi atau mengalahkan keputusan Mahkamah Tinggi yang mengikat (lihat perenggan 32, 34–35, 43 & 47).

(5) DIS yang dikeluarkan oleh responden adalah menyalahi undang-undang dan tidak sah di sisi undang-undang. Responden tidak mempunyai kuasa untuk mengeluarkan DIS di bawah ACP. ACP hanya memberi kuasa kepada responden untuk mengeluarkan Ketetapan Umum di bawah s 138A ACP mengenai pemakaian mana-mana peruntukan ACP berhubung dengan mana-mana orang atau golongan orang atau apa-apa jenis urusan (lihat perenggan 36 & 38).

(6) Tiada keperluan sama sekali bagi MR dalam *Penang Realty* untuk menimbangkan s 24(1)(a) ACP. Kedudukan responden dalam DIS adalah salah dan tidak wajar. DIS tidak mengambil kira duluan kehakiman dan menyebabkan kekeliruan yang tidak terperi kepada pembayar cukai dan warga korporat yang baik kerana ia telah meletakkan pembayar cukai dalam kedudukan konflik antara responden dan apa yang mereka fikir mereka faham tentang *Penang Realty* (lihat perenggan 21–23 & 54).

(7) Pengenalan s 4C baharu ke dalam ACP yang berkuat kuasa mulai YA 2014 dan seterusnya memerlukan pembayar cukai untuk membawa keuntungan mereka yang timbul daripada pemerolehan tanah secara wajib kepada cukai di bawah ACP. Pindaan tersebut mengakas keputusan dalam *Penang Realty* dan *Metacorp* dari YA 2014 dan seterusnya. Tetapi ia menunjukkan bahawa keputusan dalam kes tersebut mewakili undang-undang yang betul sebelum YA 2014. Oleh itu, pindaan tersebut menjejaskan kedudukan responden dalam rayuan semasa (lihat perenggan 61).

(8) Majoriti SCIT membuat keputusan sallah dengan memutuskan bahawa responden boleh menafikan relif perayu di bawah s 131 ACP walaupun ia bercanggah dengan keputusan mengikat Mahkamah Tinggi di *Penang Realty* dan *Metacorp* dan melanggar doktrin duluan kehakiman. Perayu

jelas berhak mendapat relif yang diminta di bawah s 131(1) kerana untuk memutuskan sebaliknya akan sama dengan membenarkan responden diperkaya secara tidak adil (lihat perenggan 79–80 & 82).]

Cases referred to

Atwood and Others v Sellar & Co (1879) 4 QBD 342 (refd)
Cassel & Co Ltd v Broome & Anor [1972] AC 1027, HL (refd)
Chua Lip Kong v Director General of Inland Revenue [1982] 1 MLJ 235; [1981] 1 LNS 157, SC (refd)
Co-operative Central Bank Ltd v Feyen Development Sdn Bhd [1997] 2 MLJ 829, FC (refd)
DR Fraser and Company, Limited v Minister of National Revenue [1949] AC 24, PC (refd)
Dalip Bhagwan Singh v Public Prosecutor [1998] 1 MLJ 1, FC (refd)
Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners and the Attorney General [2007] STC 1, HL (refd)
Director General of Inland Revenue v CKK [1974] 2 MLJ 104, FC (folld)
Dream Property Sdn Bhd v Atlas Holding Sdn Bhd [2015] 2 MLJ 441, FC (refd)
Edwards (Inspector of Taxes) v Bairstow and another [1955] 3 All ER 48, SC (refd)
JM Gomes & Co v Saurajen Visva Nathan [1954] 1 MLJ 3 (refd)
Jackson's Malaya Berhad v Penang Port Commission [1973] 2 MLJ 27 (refd)
Jamaluddin bin Mohd Radzi & Ors v Sivakumar a/l Varatharaju Naidu (claimed as Yang Dipertua Dewan Negeri Perak Darul Ridzuan), Election Commission, intervener [2009] 4 MLJ 593, FC (refd)
Kerajaan Malaysia v Jasanusa Sdn Bhd [1995] 2 MLJ 105, SC (refd)
Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd and another appeal [2006] 3 MLJ 597, CA (folld)
Lower Perak Cooperative Housing Society Berhad v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713; [1994] 3 CLJ 541, SC (refd)
Metacorp Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2011] 5 MLJ 447, HC (refd)
Metacorp Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri, CA (folld)
Ng Siew San v Menaka [1973] 2 MLJ 154, FC (refd)
PETRONAS Penapisan (Terengganu) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (R2–14–23 of 2011) (unreported) (refd)
Penang Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [1997] MLJU 347, HC (refd)
S Singaram v Fong Peck Moi & Anor [1976] 1 MLJ 237 (refd)
Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals [1996] 2 MLJ 265, CA (refd)

Legislation referred to

Income Tax Act 1967 ss 4(a), 4B, 4C, 24, 24(1)(a), 99, 100, 101, 102, 131, 131(1), (4), (5)(a), 138A, Schedule 5, para 34
Federal Constitution art 96
Inland Revenue Board of Malaysia Act 1995 s 10
Penang Port Commission Ordinance 1955

Anand Raj (with Foong Pui Chi, Yeoh Yu Xian and Choo Kelly) (Shearn Delamore & Co) for the appellant.
Abdul Aziz bin Harun (with Elina bt Abdul Rashid) (Revenue Counsel, Inland Revenue Board of Malaysia) for the respondent.

Noorin Badaruddin J:

[1] This is an appeal by the appellant by way of a case stated dated 29 May 2020 ('CS') pursuant to para 34 Schedule 5 of the Income Tax Act 1967 ('the ITA') against the deciding order of the Special Commissioners of income Tax ('SCIT') dated 7 June 2018. The SCIT by majority had ruled that the appellant did not qualify for the relief under s 131 of the ITA for year of assessment ('YA') 2010 in regards to the gains arising from the compensation paid by the Government for the compulsory acquisitions of part of Lot 1115 (GRN20999), part of Lot PT1 (HSD111065) and Lot PT3 (HSD111067) (collectively referred to as 'lands').

AGREED FACTS

[2] The SCIT had set out the agreed facts in the CS as follows:

7.1 Fakta Dipersetujui

(i) The appellant was incorporated as a private limited company in Malaysia on 13.12.1991 under the Companies Act 1965 under the name of Violenette Sdn Bhd. The appellant changed its name to Sime Pilmoor Development Sdn Bhd on 6.6.1996 and subsequently changed its name to Sime Darby Ara Damansara Development Sdn Bhd on 10.6.2010.

(ii) The appellant presently has its registered office and its principal place of business at Level 10, Block G, No. 2, Jalan PJU 1A/7A, Ara Damansara, PJU 1A, 47301 Petaling Jaya, Selangor Darul Ehsan.

(iii) During the relevant years of assessment (hereinafter referred to as 'Y/As'), the appellant was carrying on business in property investment and development.

(iv) On 20.4.2006, the Court of Appeal in the case of *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd and another appeal* [2006] 3 MLJ 597 (hereinafter referred to as *Penang Realty COA*) held in favour of the taxpayer that the gains arising from the compulsory acquisition of land are not subject to income tax under the Income Tax Act 1967 (hereinafter referred to as 'ITA').

(v) Following the decision in *Penang Realty COA* the respondent issued a decision

impact statement in February 2007 to state the respondent's position that the gains arising from the compulsory acquisition of land shall be subject to income tax (hereinafter referred to as 'DIS'). A

(vi) Pursuant to the Sale and Purchase Agreement dated 28.7.1992, the appellant acquired several pieces of land situated in Mukim Damansara, Daerah Petaling (hereinafter referred to as 'SPA Land'). The SPA Land included part of Lot 1115 (GRN20999), part of Lot PT1(HSD111065) and Lot PT3(HSD111067) (hereinafter collectively referred to as 'Subject Lands'). B

(vii) The Subject Lands were compulsorily acquired by the Selangor State Government pursuant to the Land Acquisition Act 1960 during the years 2009 and 2010 (hereinafter collectively referred to as 'Compulsory Acquisitions'). C

(viii) During the basis period for the Y/A 2010, the appellant received compensation in the amount of RM42,341,100 for the Compulsory Acquisitions of the Subject Lands and of this sum, RM33,953,500 constitutes the gains on the same during the basis period for the Y/A 2010. D

(ix) The appellant applied the DIS and brought the gains arising from the Compulsory Acquisitions to income tax in its tax return/deemed assessment for Y/A 2010, which was filed on 31.1.2011, and paid the income tax on the same.

(x) On 15,3.2011, the High Court in the case of *Metacorp Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2011] 5 MLJ 447 followed, amongst others, the decision of *Penang Realty COA* and held in favour of the taxpayer (hereinafter referred to as *Metacorp HC*). Thereafter, the decision in *Metacorp HC* was unanimously affirmed by the Court of Appeal (hereinafter referred to as *Metacorp COA*). E

(xi) The respondent's application for leave to appeal to the Federal Court in the *Metacorp* case was dismissed on 9.11.2011. F

(xii) Upon being made aware that the Federal Court had dismissed the respondent's leave application, the appellant wrote to the respondent on 1.3.2013 and applied for relief in respect of an error or mistake under s 131(1) of the ITA and/or Malaysian law for Y/A 2010 and submitted a revised tax computation (hereinafter referred to as 'RTC') to amend the tax treatment on the gains arising from the Compulsory Acquisitions to capital in nature (hereinafter referred to as 'appellant's s 131 Application') in accordance with the *Penang Realty COA* and the *Metacorp COA* decisions. G

(xiii) On 2.5.2014, the respondent requested additional supporting documents for the RTC which were duly furnished by the appellant under cover of the appellant's tax agents, Messrs. KPMG Tax Services Sdn Bhd's letter dated 12.5.2014. H

(xiv) However, by a letter dated 23.9.2014, the respondent rejected the appellant's s 131 Application (hereinafter referred to as 'respondent's Decision').

(xv) In the light of the respondent's Decision and pursuant to s 131(5)(a) of the ITA, the appellant wrote to the respondent on 29.12.2014 and requested the respondent to forward the appellant's s 131 Application to be heard by and before the Honourable Special Commissioners of Income Tax (hereinafter referred to as 'SCIT') and to facilitate this process, the appellant also lodged Form CP15C for Y/A 2010 with the respondent (hereinafter referred to as 'the said Form CP15C'). I

(xvi) The said Form CP15C was then forwarded by the respondent to the SCIT on 13.3.2015 in accordance with s 131(5)(b) of the ITA and registered as PKCP(R) 68/2015.

(xvii) Particulars of the Y/A, deemed assessment and Form CP15C which are the subject matter of this case are as follows:

Y/A	Date of Deemed Assessment	Date of Form CP 15C	Total Tax Payable
2010	31.1.2011	29.12.2014	RM11,573,519.25

FACTS PROVED

[3] Upon consideration of oral and documentary evidence and hearing oral evidence from the appellants' witnesses, AW1 and AW2 as well as the respondent's witness, RW1, the SCIT laid down the 'facts proved' as follows:

7.2 Fakta Yang Dibuktikan

(i) AW1 was involved in the preparation of the appellant's tax return and tax computations for Y/A 2010 and her work scope required her to review the tax computation and to liaise with Sime Darby Group Tax department, the appellant's tax agents and Sime Darby Property Berhad's Finance Department on the appellant's tax returns and to prepare the same prior to submission to the respondent.

(ii) As an accountant, AW1 is familiar with basic tax principles. However, AW1 is not a tax specialist.

(iii) As the appellant relies on the centralised Finance Department of its holding company ie Sime Darby Property Berhad, the appellant does not require its own finance and tax staff. By centralising this finance function, it is more cost effective for the Sime Darby Property Division.

(iv) Generally, Sime Darby Group Tax Department assists the appellant's group of companies on general tax matters because some of the companies do not have any in-house tax personnel.

(v) As part of Group Tax's role, AW2 provides assistance: on all tax related matters such as review of tax returns, monitor tax compliance submission deadlines and discuss tax related issues with the appellant.

(vi) According to AW1, the decision impact statement at pages 191 to 193 of the Agreed Bundle of Documents (Exhibit C) is described by the DGIR as providing a statement of the DGIR's interpretation in relation to the decision of the Court of Appeal in the *Penang Realty* case. The DGIR's view was that s 24(1)(a) of the ITA should also be applicable to compulsory acquisitions so long as the subject property was part of the stock in trade of the taxpayer.

(vii) According to AW2, the decision impact statement at pages 191 to 193 of the Agreed Bundle of Documents referred to the *Penang Realty* Sdn Bhd's appeal at the Court of Appeal whereby the Court of Appeal had decided that the compulsory acquisition by the Government of Penang Realty's land does not constitute a sale as there is element of compulsion and hence the compensation did not arise from a

business activity. However, the DGIR pointed out in the decision impact statement that the Court of Appeal did not consider s 24(1)(a) of the ITA whereby income tax is applicable if the asset compulsorily acquired is a stock in trade. DGIR is of the opinion that s 24(1)(a) of the ITA is applicable if the asset compulsorily acquired is a stock in trade.

(viii) Based on AW2's knowledge and experience, the decision impact statement issued by the DGIR is a strong statement as it clearly states the DGIR is taking a position that is contrary to the decision of the Court of Appeal in the *Penang Realty*'s case.

(ix) Throughout AW2's 16 years in doing tax work, AW2 is aware that there are 3 decision impact statements but AW2 is only familiar with the contents of the decision impact statement at pages 191 to 193 of the Agreed Bundle of Documents and this was also the first decision impact statement that AW2 had to deal with.

(x) Based on Group Tax's internal records and as verified from certain tax publications, the decision impact statement was issued by the DGIR sometime in February 2007 which was after the Court of Appeal's decision in the *Penang Realty*'s case on 20 April 2006.

(xi) To the best of AW2's knowledge, the issuance of decision impact statements by the DGIR is not a normal occurrence at all. To-date AW2 is only aware of 3 decision impact statements, all of which were issued around 2007 and there were none before nor any since then.

(xii) AW2 has confirmed that decision impact statements are different from public rulings because so far there are only 3 decision impact statements issued by the DGIR and they basically merely set out the DGIR's views on tax cases. There are no details in the decision impact statements in terms of the consequences of following or not following the decision impact statements.

(xiii) AW1 first came across the decision impact statement in early January 2011, just before the appellant's tax return for Y/A 2010 was filed.

(xiv) AW1 has only come across the decision impact statement referred to above on compulsory acquisitions. AW1 is not aware of any other decision impact statements.

(xv) Before the appellant finalised the tax return and tax computation for Y/A 2010, the appellant discussed with Sime Darby Group Tax department about the 2 options that they had which are different in terms of the tax treatment on compulsory acquisition. One is the *Penang Realty* case whereby it was in favour of the taxpayer and the other one is the decision impact statement issued by the DGIR in relation to the decision by the Court of Appeal on *Penang Realty* case. After their discussion, the decision made by the appellant then was to give the DGIR the benefit of the doubt and to rely upon and follow the DGIR's position stated in the decision impact statement because the DGIR via the decision impact statement had taken the view that the Court of Appeal in *Penang Realty* was wrong as it had not considered s 24(1)(a) of the ITA.

(xvi) The appellant brought the gains arising from the Compulsory Acquisitions to income tax in its tax return for Y/A 2010 which was filed on 31.1.2011 because

being a good corporate citizen, the appellant's decision then was to follow the DGIR's interpretation as stated in the DGIR's decision impact statement on compulsory acquisitions.

(xvii) Since the appellant has decided to give the benefit of the doubt to the respondent and relied upon the DGIR's decision impact statement, at that point of time when filing the tax return for Y/A 2010, the appellant believed that its decision was correct and hence there was no need to file Form Q and Form N because the appellant was not aggrieved by its own deemed assessment.

(xviii) After the gains arising from the Compulsory Acquisitions were brought to tax in the appellant's tax return for Y/A 2010, the appellant paid income tax on the gain of approximately RM33.95 million on the Compulsory Acquisitions of the Lands at the end of January 2011. Then in March 2011, High Court's decision was in favour of *Metacorp*. Subsequently in August 2011, Sime Darby Group Tax informed the appellant that the Court of Appeal's decision was also in favour of *Metacorp* and thereafter the respondent applied for leave to appeal to the Federal Court. However, the respondent's application for leave to appeal to the Federal Court was dismissed by the Federal Court.

(xix) AW2 came to know that the Federal Court had dismissed the DGIR's leave application in the *Metacorp* case sometime in July 2012 and thereafter Sime Darby Group Tax Department had a discussion with the appellant sometime in July 2012 to inform them about the outcome of *Metacorp*'s case at the Federal Court level. Once the appellant became aware, the appellant decided to revise its tax return and tax computation for Y/A 2010 to amend the mistake made in the original tax return and original tax computation.

(xx) The appellant found out sometime in July 2012 from Sime Darby Group Tax department that the High Court, Court of Appeal and Federal Court ruled in favour of *Metacorp* and said that s 24(1)(a) of the ITA did not alter the decision in *Penang Realty*. This meant that the DGIR's decision impact statement and the views contained therein were mistaken.

(xxi) After the appellant became aware of the final outcome of the *Metacorp* case at the Federal Court sometime in July 2012, only then the appellant realised that it had made a mistake by relying upon and following the DGIR's view in the decision impact statement.

(xxii) Upon being made aware that the DGIR had lost before the Federal Court in the *Metacorp* case, the appellant proceeded to prepare the revised tax computation for Y/A 2010 to follow the tax treatment in favour of the taxpayer applied in the cases of *Penang Realty* and *Metacorp*. Based on the revised tax computation, the appellant had overpaid RM8,488,375 in income tax.

(xxiii) The appellant then filed an application under s 131 of the ITA as there was a mistake and Forms N and Q would not be applicable.

(xxiv) The purpose of the appellant's letter dated 1.3.2013 was to apply for relief under s 131(1) of the ITA in respect of the error or mistake made in the appellant's Y/A 2010 tax returns submitted earlier on ('s 131 Application'). The letter explains that the reason why the appellant had made an error or mistake under s 131 of the ITA was because the appellant had relied on DGIR's decision impact statement. So based on the outcome in the *Metacorp* case, the appellant revised its tax returns and

tax computation for Y/A 2010 and requested the DGIR to reduce the assessment for Y/A 2010 and to issue the Notice of Reduced Assessment for Y/A 2010. The enclosures to the said letter are the revised tax computation and the relevant amended pages of Form C for Y/A 2010.

(xxv) The grounds for the revision of the appellant's tax computation for Y/A 2010 are that the appellant realised that it had made a mistake to have relied upon and followed the decision impact statement on the tax treatment for the compulsory acquisition in light of the final outcome of the *Metacorp* case. This meant that the appellant had also mistakenly overstated its income subject to tax in its Y/A 2010 tax return.

(xxvi) The centralised Finance Department of Sime Darby Property Berhad, including AW1, worked together with the Sime Darby Group Tax department in preparing the said letter dated 1.3.2013 and attachments and AW1 signed the letter as AW1 was then the Vice President II — Finance in charge.

(xxvii) AW2 was involved in the review of the appellant's tax returns and tax computations from Y/A 2011 onwards. In the course of AW2's review of the appellant's tax returns and tax computations for Y/A 2011, AW2 had access to the appellant's Y/A 2010's tax returns and tax computations as a point of reference and hence AW2 is aware of the facts and figures relating to the tax returns and tax computations for Y/A 2010.

(xxviii) in other words, the appellant submitted its original tax return for Y/A 2010 by itself and then AW2 subsequently assisted the appellant in revising the Y/A 2010 tax return and tax computation in 2013.

(xxix) According to AW2, the appellant had to revise its tax return and tax computations for Y/A 2010 due to subsequent developments in the *Metacorp Development* case. The Court of Appeal held in favour of *Metacorp* that the gains on compulsory acquisition cannot be part of the company's trading profit and specifically ruled that s 24(1)(a) of the ITA cannot be applied if the stock-in-trade was compulsorily acquired and the acquisition was not in the course of carrying on a business. The respondent then applied for leave to appeal to the Federal Court but the application was dismissed by the Federal Court. Since the appellant's scenario is similar to that of *Metacorp Development*, the appellant decided to revise its tax returns and tax computations for Y/A 2010 in line with the *Metacorp* and *Penang Realty* court decisions.

(xxx) According to AW2, the appellant had made a mistake by applying the DGIR's decision impact statement and subjecting the gains arising from the compulsory acquisition to tax in the tax returns and tax computations for Y/A 2010. In the DGIR's decision impact statement, the DGIR stated that the Court of Appeal in *Penang Realty* did not consider s 24(1)(a) of the ITA. However, applying the final outcome in the *Metacorp Development* case whereby the facts are similar to that of the appellant, s 24(1)(a) of the ITA did not apply to *Penang Realty*. This meant that the DGIR's decision impact statement and the views therein were a mistake and the gains arising from the compulsory acquisition in Y/A 2010 is capital in nature and should not be subject to income tax.

(xxxi) The e-mail from the respondent dated 2.5.2014 made reference to the appellant's s 131 Application in March 2013 and via this e-mail, the respondent requested additional documents for their further action.

(xxxii) The purpose of the letter from KPMG Tax Services Sdn Bhd ('KPMG') to the respondent dated 12.5.2014 is to respond to the respondent on their earlier request for additional documents via the abovementioned e-mail. The enclosures to this letter are the relevant documents required by the respondent.

(xxxiii) in response to the appellant's letter dated 1.3.2013, the respondent issued a letter dated 23.9.2014 to the appellant and informed that they had rejected the appellant's s 131 Application on the following grounds:

(a) the tax computation submitted earlier in 2011 was in line with the respondent's general practice at that point in time;

(b) the tax treatment was correct and in order at the point when the Y/A 2010 tax return was filed;

(c) the appellant did not submit any appeal within 30 days from the tax returns/deemed assessment for Y/A 2010; and

(d) the s 131 Application was only made by the appellant after the *Metacorp* case was decided by the Federal Court.

(xxxiv) Based on AW2's knowledge and experience, the DGIR's decision in letter dated 23.9.2014 is not fair as the appellant should not be denied the revision of its tax returns and tax computation in respect of Y/A 2010 as the appellant had relied on the decision impact statement issued by the DGIR and that turned out to be a mistake. Hence, the appellant has clearly satisfied the requirements in s 131 of the ITA.

(xxxv) In the letter dated 23.9.2014, the respondent also informed that if the appellant is not satisfied with the DGIR's decision, an appeal should be submitted to the SCIT within 6 months from the date of the letter. Hence, following the respondent's rejection of the appellant's s 131 Application, the purpose of the appellant's letter to the respondent dated 29.12.2014 was to invoke s 131(5)(a) of the ITA to request the respondent to forward the appellant's. Section 131 Application to be heard by SCIT and consequently also to request the respondent to forward the said application to the SCIT within 3 months from its request as provided under s 131(5)(b) of the ITA. The letter's enclosure is the appellant's Form CP15C for Y/A 2010 dated 29.12.2014 for the respondent's onward submission to the SCIT. Sime Darby Group Tax also worked together with the appellant and assisted the appellant in preparing this letter.

(xxxvi) AW1 was of the view that the appellant has been treated unfairly in this case because in the first place, it had previously given the benefit of the doubt to the DGIR by relying upon and following the DGIR's decision impact statement even knowing that there could potentially be a substantial overpayment of tax. However, upon becoming aware that the DGIR lost its case at the Federal Court, the appellant submitted its revised tax computation to follow *Penang Realty* and *Metacorp*. Thereafter the appellant was shocked that the Revenue did not accept its revised tax computation and wanted to keep the tax even though they had failed to uphold their views (as per the decision impact statement) in court. AW1 was of the view that

this is extremely unfair towards to the appellant.

(xxxvii) AW2 was of the view that the DGIR has not been fair to the appellant as the position taken by the appellant on the gains arising from the compulsory acquisition in Y/A 2010 was clearly relying on the decision impact statement issued by the DGIR and since the DGIR's interpretation and understanding on s 24(1) (a) of the ITA in the decision impact statement was mistaken, the appellant's reliance upon the decision impact statement was also mistaken and all these led to the error in overstating the appellant's income in the tax return for Y/A 2010 and this has prejudiced the appellant. The appellant will pay its fair share of tax, but not extra. The mistake in the tax returns and tax computation for Y/A 2010 by the appellant was made because being a good corporate taxpayer, the appellant gave the DGIR the benefit of the doubt. Therefore, DGIR should accept the appellant's revision of the tax return and tax computation for Y/A 2010.

(xxxviii) If the appellant had known that the DGIR's views in the decision impact statement were mistaken and about the final outcome of the Metacorp case before filing its tax returns for Y/A 2010, the appellant would not have relied upon the DGIR's decision impact statement as that would result in a mistake, an overstatement of income in its tax return and an overpayment of tax.

(xxxix) AW2 confirmed that at the time the original tax computation was filed, *Metacorp* case in the Federal Court has not been decided yet and thus the appellant could not have taken it into account.

(xl) The consequence of the appellant's mistake in relying upon the DGIR's decision impact statement in this case is that the appellant overstated its taxable income in its tax returns for Y/A 2010 and as a result overpaid income tax by RM8,488,375. According to AW1, this has prejudiced the appellant

(xli) AW2 is not aware of any public statement or document issued by Revenue acknowledging that the decision impact statement in this case is wrong or need not be followed and there is also no apology from the Revenue on this point.

(xlii) According to AW1, as far as the appellant is concerned, based on the respondent's letter dated 23.9.2014, the appellant has taken note that the respondent has actually acted according to the s 131(5) of the ITA and based on the contents of that letter, the appellant's understanding is that there was no further avenue to go back to the respondent for clarification or appeal as the respondent had stated in para 3 of that letter that: 'Sekiranya pihak tuan tidak berpuas hati dengan keputusan ini, pihak tuan hendaklah dalam tempoh masa 6 bulan daripada tarikh surat ini membuat permintaan supaya permohonan rayuan tuan dikemukakan kepada PKCP.' As such, in accordance with that para 3, the appellant wrote to the respondent on 29.12.2014 and requested the respondent to forward the appellant's s 131 Application to be heard by and before the SCIT.

(xliii) AW1 has confirmed that there was no mention or reference in the respondent's letter dated 23.9.2014 that there was any room for clarification or further negotiation with the respondent.

(xliv) AW1 has confirmed that there was no letters from the respondent which referred to Form N or Section 100 of the ITA.

(xlv) AW2 also stated that everyone makes mistake and that is why there is a provision in Income Tax Act 1967 that allows taxpayers to claim relief in respect of error or mistaken under s 131.

(xlvi) AW2 is also not aware of any public statements or guidelines issued by Revenue that says that the taxpayer cannot use s 131 if there is a mistake made but must use Form N and Form Q.

(xlvii) AW2 is not aware of anything in the law that prevents a taxpayer from making a s 131 claim because the taxpayer did not file Forms N and Q.

(xlviii) As the appellant had followed and relied upon the decision impact statement when it filed its tax return for Y/A 2010, Form Q was therefore not applicable. It was only later that the appellant discovered that all this was a mistake and so the appellant filed an application for relief in respect of error or mistake under the appropriate section which is s 131 of the ITA.

(xlix) AW2 has confirmed that in this case the Revenue did not invite the appellant to file a Form N with an indication that they will allow the extension of time.

(l) Although the respondent had clearly stated in para 3 of the its letter dated 23.9.2014 that the appellant should within 6 months from the date of the letter request the respondent to forward its s 131 Application to the SCIT, during re-examination, RW1 had stated that the appellant was not required to comply with para 3.

(li) AW1 confirmed that 'practice' is something that a person or a party has been doing all this while which is different from view and position which to AW1's understanding is something that is going to be applied in the future. As such, according to AW1, 'practice'and 'view'are totally different.

(lii) Both AW1 and AW2 confirmed that the decision impact statement merely sets out the DGIR's view on the *Penang Realty* case and not the practice of the DGIR.

(liii) Both AW1 and AW2 are not aware of the existence of any DGIR's practice in relation to compulsory acquisition,

(liv) RW1 has confirmed that the respondent's letter dated 23.9.2014 does not directly or indirectly refer to Form N or Section 100 of the ITA.

(liii) RW1 has confirmed that generally, the provisions of the ITA do not prevent a taxpayer from making an application under s 131 of the ITA.

(lvi) According to RW1, the word 'amalan' means what the Revenue practises based on the provisions of the ITA whereas the word 'pendirian' means a statement from the Revenue and the Revenue will stand firm on that statement so long there are no amendments made to the ITA.

(lvii) According to RW1, 'practice' is different from 'view' or 'position';

(lviii) RW1 also confirmed that the 'generally prevailing practice' that is referred to under s 131(4) of the ITA must be a practice that is valid under the law and if a practice is contrary to the law, s 131(4) would not be applicable.

(lix) Although RW1 acknowledged that the Superior Courts in *Penang Realty* and *Metacorp* have held that the gains arising from the compulsory acquisition of land should not be subject to income tax, she has nevertheless confirmed that the DGIR as well as all the staff in the Inland Revenue Board must still comply with the

provisions of the ITA by hook or by crook and that they need not follow the decisions of the Superior Courts and can disregard the same.

SCITS DECISION

[4] The SCIT's decision is a majority decision. Two out of the three members of the SCIT decided as follows:

> Keputusan
>
> Setelah meneliti hujahan pihak-pihak dan juga dokumen-dokumen serta kenyataan yang dikemukakan oleh saksi-saksi, kami berdua dengan ini memutuskan untuk menolak rayuan Perayu untuk relif di bawah Seksyen 131(1) *berdasarkan peruntukan* seksyen 131(4) ACP 1967 dan taksiran adalah dikekalkan.
>
> (E) Alasan
>
> (i) Kami berpandangan Perayu telah gagal membuktikan bahawa responden telah salah atau berlebihan dalam mengenakan taksiran di bawah ACP 1967.
>
> (ii) Kami juga bersetuju dengan hujahan Responden bahawa tindakan Perayu membuat permohonan untuk relif adalah tidak sah dan perlu ditolak kerana melihat kepada peruntukan seksyen 131(4) jelas menyatakan bahawa relif tidak boieh diberikan sekiranya kesilapan atau kekhilafan yang menjadi asas kepada pengenaan cukai oleh Perayu adalah berdasarkan kepada amalan Responden di bawah seksyen 24(1)(a) ACP semasa Borang Nyata Cukai tersebut dibuat
>
> (ii) Berdasarkan fakta yang dikemukakan oleh RW1 semasa perbicaraan, jelas menunjukkan bahawa Perayu sedar tentang pematuhan keperluan undang-undang di bawah Seksyen 24 ACP, amalan LHDN pada masa tersebut adalah penerimaan daripada 'compulsory acquisition' adalah tertakluk kepada cukai pendapatan. Perayu tidak melakukan kesilapan semasa menyediakan Borang retan dan diakui sendiri oleh keterangan AW1 dan AW2.

SUMMARY OF THE APPELLANT'S CONTENTIONS

[5] In contending that it qualifies for relief under s 131 of the ITA for YA 2010 in regards to the compensation of the lands, the appellant submits that the majority SCIT had ignored the extensive primary facts found in this case and had reached conclusions which are perverse and bad in law.

[6] The respondent is submitted to have shown complete and utter disrespect to the doctrine of judicial precedent as they have sought to use s 131(4) of the ITA to override and disregard the binding Superior Court's decision in the case of *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd and another appeal* [2006] 3 MLJ 597 ('Penang Realty'); *Metacorp Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2011] 5 MLJ 447 ('Metacorp') and *PETRONAS Penapisan (Terengganu) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (R2–14–23 of 2011) (unreported) ('PPTSB') to

deprive the appellant of the RM8,488,375 in taxes which the appellant is said to have overpaid.

[7] The decision impact statement ('DIS') issued by the respondent is contended to have misled taxpayers like the appellant and the respondent had wrongly treated the DIS as falling within the meaning of a 'practice of the Director General generally prevailing' under s 131(4) of the ITA when not a single shred of evidence was adduced by the respondent to show the existence of any such practice. The appellant submits that the DIS which is not legalised by any provisions of the ITA, is the illegal 'backdoor' that the respondent seeks to create to escape binding judicial precedent.

[8] The respondent is further submitted to have acted in bad faith by resorting to various procedural means to deny the appellant of its entitlement under s 131 of the ITA.

SUMMARY OF THE RESPONDENT'S CONTENTIONS

[9] The respondent takes the position that the present matter involves question of compliance of the procedure as set out under s 131 of the ITA. It is the respondent's contention that the appellant has failed or choose to ignore the clear provision of the law in regards to the procedural requirements and conditions of an appeal of error and mistake under s 131(4) of the ITA.

[10] It is submitted that the majority SCIT is correct in finding that since the appellant had decided to give the benefit of the doubt to the respondent and relied upon the respondent's position stated in the DIS at the material time when filling the tax return for the YA 2010, the appellant believed that their decision was correct and that therefore there was no error or mistake as alleged by the appellant.

[11] According to the respondent the appellant's alleged 'error and mistake' cannot be an 'error and mistake' as intended under s 131 of the ITA as the appellant had chosen to follow the prevailing practice of the respondent when preparing its tax returns for the YA 2010. The appellant is said to have been aware at ali material time that the stand taken by the respondent in the DIS is in accord with s 24 of the ITA.

[12] It is further contended that the appellant is attempting to benefit from the *Metacorp* case and in failing to file the appeal within the prescribe time, the appellant is relying on 'error and mistake' when there are no such 'error and mistake' since at all material time, the appellant had chosen to follow the DIS which is a practice of the respondent prevailing.

FINDINGS

[13] The principles of law regarding the duty of the courts when hearing appeals from the SCIT can be found in the case of *Lower Perak Cooperative Housing Society Berhad v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713; [1994] 3 CLJ 541 where the Supreme Court had adopted the principles laid down in *Edwards (Inspector of Taxes) v Bairstow and another* [1955] 3 All ER 48 as follows:

> When the case comes before the court it is the duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad in law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So, there, too there has been an error of law.

[14] In the same case, the Supreme Court in reference to the case of *Chua Lip Kong v Director General of Inland Revenue* [1982] 1 MLJ 235; [1981] 1 LNS 157, had further stated:

> ... it is plainly wrong in law; or else it is a conclusion of mixed fact and law that no reasonable special commissioners could have reached if they had correctly directed themselves in law. Whichever was it is looked at, it falls within well-known principle laid down by Viscount Radcliffe in *Edwards v Bairstow*. It is a conclusion or decision of the special commissioners which the High Court was entitled to and ought to have set aside.

[15] It can be distilled from the authorities that in an appeal against the deciding order of the SCIT, the following are the different kinds of findings that could be made by the SCIT namely:

(a) findings of primary facts which are usually admitted by the parties or proved by either of them to the satisfaction of the Special Commissioners; and

(b) inferences drawn from such primary facts. There are two such types of inferences, namely:

  (i) inferences of fact; or

  (ii) inferences of mixed fact and law.

[16] The effect of error committed by the SCIT in reaching conclusion inconsistent with the primary facts was succinctly explained by the landmark case of *Edwards v Bairstow* where Viscount Simonds of the Privy Council had

held in the following forceful terms:

> The primary facts, as they are sometimes called, do not in my opinion justify the inference and conclusion which the Commissioners have drawn: not only do they not justify it but they lead irresistibly to the opposite inference or conclusion. *It is therefore a case in which whether it be said of the Commissioners that their finding is perverse or that they have misdirected themselves in law by a misunderstanding of the statutory language or otherwise, their determination cannot stand.* I venture to put the matter thus strongly because I do not find in the careful and indeed exhaustive statement of facts any item which points to the transaction not being an adventure in the nature of trade. Everything pointed the other way. (Emphasis added.)

[17] A further finding that could be made by the SCIT is one of law. Again, Viscount Simonds in the following passage in *Edwards v Bairstow* held:

> But it is a question of law, not of fact, what are those characteristics, or, in other words, what the statutory language means ...

[18] It can be gleaned from the highest authorities in the above that an appellate court can review or question the following aspects of the SCIT decision:

(a) findings or inferences of fact on the ground that they are wholly unsupported by the evidence or that they are based on a view of the facts which could not reasonably be entertained;

(b) findings or inferences of mixed fact and law;

(c) findings or inferences of law; and

(d) where the SCIT misdirected themselves by reaching a conclusion blatantly inconsistent with the primary facts.

[19] The core issue in the present tax appeal is whether the appellant qualifies for relief under s 131(1) of the ITA for YA 2010 in regard to the gains arising from the compensation paid for the compulsory acquisitions of the lands.

[20] The issue arising herein stems from the decision of the Court of Appeal in the *Penang Realty* case. The Court of Appeal on 20 April 2006 had decided in that case that the proceeds of which the appellant therein had received in the form of compensation from a compulsory acquisition were not subject to income tax under the ITA because the element of compulsion in the compulsory acquisition negatives any intention to trade. Consequent to the decision in *Penang Realty*, the respondent issued the DIS consisting of his view as to the implication of the decision in *Penang Realty*. The respondent took the position that the gains arising from the compulsory acquisition of land should be subject to income tax by applying s 24(1)(a) of the ITA which was not considered by the Court of Appeal. The relevant part of the DIS is reproduced:

Implication of the Decision

1. It is important to note that the Court of Appeal did not consider the provision of s 24(1) of the ITA where the said provision clearly provides that any debt arises in respect of stock in trade which is compulsorily acquired shall be treated as gross income from a business.

Section 24(1)(a) of the ITA *provides as follows* —

24(1) Where in the relevant period a debt owing to the relevant person arises in respect of:-

(a) any stock in trade sold (or parted with on requisition or compulsory acquisition or in a similar manner) in or before the relevant period in the course of carrying on a business;

(b) -not applicable-

(c) -not applicable-

The amount of the debt shall be treated as gross income of the relevant person from the business for the relevant period.

2. *As the decision was entirely based on the principle enunciated in Lower Perak Co-Operation Housing Society Berhad v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713; (1994) 3 CLJ 540*, the DGIR is of the opinion that s 24(1) (a) of the ITA is applicable in other cases where asset compulsorily acquired is a stock in trade of a person.* (Emphasis added.)

[21] In 2011, the High Court in *Metacorp* had referred to *Penang Realty* case and held that s 24 of the ITA had no relevance at all in the case of *Penang Realty* COA.

[22] The decision in *Metacorp* was unanimously affirmed by the Court of Appeal. The respondent's application for leave to appeal to the Federal Court was dismissed on 9 November 2011.

[23] It is therefore clear from the decision in *Metacorp* that there was no necessity at all for the Court of Appeal to consider s 24(1)(a) of the ITA in *Penang Realty*.

[24] This court will leave for a moment the decision in *Penang Realty* and *Metacorp* at this juncture.

[25] It is clear from the case stated that the issue relates to s 131 of the ITA which specifically provides an avenue for taxpayers to claim relief for excessive tax paid due to error or mistake. Section 131 of the ITA states:

131 Relief in respect of error or mistake

(1) If any person who has paid tax for any year of assessment alleges that an assessment relating to that year is excessive by reason of some error or mistake in a

return or statement made by him for the purposes of this Act and furnished by him to the Director General prior to the assessment becoming final and conclusive, he may within five years after the end of the year of assessment within which the assessment was made make an application in writing to the Director General for relief.

(2) On receiving an application under subsection(1) the Director General shall inquire into the matter and, subject to this section, shall give by way of repayment of tax such relief in respect of the alleged error or mistake as appears to him to be just and reasonable.

(3) In determining any application under this section the Director General shall have regard to all the relevant circumstances of the case and in particular —

(a) shall consider whether the granting of relief would result in the exclusion from charge to tax of income of the applicant; and

(b) for that purpose may take into consideration the chargeability of the applicant for years of assessment other than the year to which the application relates and assessment made upon him for those years.

(4) No relief shall be given under this section in respect of an error or mistake as to the basis on which the chargeability of the applicant ought to have been computed if the return or statement containing the error or mistake was in fact made on the basis of, or in accordance with, the practice of the Director General generally prevailing at the time when the return or statement was made.

(5) An application under subsection (1) shall be as nearly as may be in the same form as a notice of appeal under section 99; and, where the applicant is aggrieved by the Director General's decision on the application —

(a) the applicant may within six months after being informed of the decision request the Director General in writing to send the application forward to the Special Commission ers;

(b) the Director General shall within three months after receiving the request send the application forward as if he were sending an appeal forward pursuant to section 102; and

(c) the application shall thereupon be deemed to be an appeal and shall be disposed of accordingly.

[26] Sections 99–102 of the ITA are the appeal provisions for taxpayers to appeal against the assessments made by the respondent. Pursuant to s 99 of the ITA, a person who is aggrieved by an assessment which has been made on him by the respondent is entitled to appeal against that assessment to the SCIT. An appeal must be made no later than 30 days after the notice of assessment has been served on the taxpayer by submitting *Form Q* to the Director General. The taxpayer can file an application for extension of time to file the Form Q. The application can be made by way of *Form N*. In the *Form N* the taxpayer should state reasonable grounds for the delay in filing the *Form Q* (see s 102 of the ITA).

[27] After rejecting the appellant's appeal by reason of s 131(4) of the ITA, the respondent before this court came up with the argument that the appellant should have resort to s 99 of the ITA which states:

> 99 Right of appeal
>
> (1) Subject to subsection (1A), a person aggrieved by an assessment made in respect of him may appeal to the Special Commissioners against the assessment by giving to the Director General within thirty days after the service of the notice of assessment or, in the case of an appeal against an assessment made under section 92, within the first three months of the year of assessment following the year of assessment for which the assessment was made (or within such extended period as regards those days or months as may be allowed under section 100) a written notice of appeal in the prescribed form stating the grounds of appeal and containing such other particulars as may be required by that form.
>
> (1A) A person who has failed to furnish a return for a basis period for a year of assessment in accordance with subsection 77A(1) may appeal against the assessment made by the Director General under subsection 90(3) by furnishing a return for that basis period for that year of assessment together with the written notice of appeal referred to in subsection (1) within the time stipulated for giving of the notice.
>
> (2) Where an assessment has been made in respect of a person appointed under section 68 to be the agent of another person, the agent and that other person shall for the purposes of this section and the other provisions of this Act relating to appeals each be treated as the person in respect of whom the assessment was made and, if they both appeal against the assessment, their appeals shall if possible be dealt with together:
>
> Provided that, in the case of a receiver deemed by subsection 68(4) to have been appointed under subsection 68(1) to be the agent of a court, this subsection shall not apply.
>
> (3) Where in a case to which section 67 applies the principal has appealed against an assessment, the representative, whether or not he himself has appealed or is entitled to appeal against the assessment and without prejudice to any power conferred on him by subparagraph 14(c) of Schedule 5, may represent and act generally on behalf of the principal for the purposes of the provisions of this Act relating to appeals ('the principal' and 'the representative' here having the same meaning as in section 67).
>
> (4) This section shall not apply to an assessment made under subsection 90(1) or section 91A, except where a person in respect of such assessment is aggrieved by the public ruling made under section 138A or any practice of the Director General generally prevailing at the time when the assessment is made.

[28] It can be comprehended that the appeal provisions under ss 99–102 of the ITA relate to an appeal by the taxpayer where the taxpayer is aggrieved with the assessment made by the respondent, which is not the case herein.

[29] In the instant matter, the appellant is not aggrieved with the respondent's assessment but instead they are aggrieved with their own mistake. In such circumstances, Parliament had addressed this situation by legislating s 131 of the ITA where taxpayers are provided with an avenue to get back their overpaid money due to their mistake when filing their tax returns. It can be understood that s 131 of the ITA was legislated to cater to situation where taxpayers who in the recent years have been commonly filing their tax return based on self-assessment commit error or mistake in their self-assessment of their tax returns. It must be borne in mind that income tax is tax collected under the law where taxpayer is to pay whatever is due and if the taxpayer has made some error or mistake and where there is an overpayment, Parliament had ensured that the taxpayers should get the return of their money pursuant to s 131 of the ITA. If there is an obvious mistake, the respondent must not hold the money overpaid by the taxpayer.

[30] So here is the case where the majority SCIT had made findings of facts under 'Fakta Yang Dibuktikan' or facts proved that the appellant had made error or mistake when they filed their tax return and decided to revise their tax returns and tax computation. Therefore the appellant cannot be faulted for not filing the Form Q or Form N under s 99 or 102 of the ITA. In other words, since there was a mistake on the part of the appellant in their computation of tax and tax return, Forms N and Q would not be applicable. The critical findings of facts proved can be seen in the CS as follows:

> (xix) AW2 came to know that the Federal Court had dismissed the DGIR's leave application in the *Metacorp* case sometime in July 2012 and thereafter Sime Darby Group Tax Department had a discussion with the appellant sometime in July 2012 to inform them about the outcome of *Metacorp*'s case at the Federal Court level. *Once the appellant became aware, the appellant decided to revise its tax return and tax computation for Y/A 2010 to amend the mistake made in the original tax return and original tax computation.*
>
> (xx) The appellant found out sometime in July 2012 from Sime Darby Group Tax department that the High Court, Court of Appeal and Federal Court ruled in favour of *Metacorp* and said that s 24(1)(a) of the ITA did not alter the decision in *Penang Realty*. *This meant that the DGIR's decision impact statement and the views contained therein were mistaken.*
>
> (xxi) *After the appellant became aware of the final outcome of the Metacorp case at the Federal Court sometime in July 2012, only then the appellant realised that it had made a mistake by relying upon and following the DGIR's view in the decision impact statement.*
>
> (xxii) Upon being made aware that the DGIR had lost before the Federal Court in the *Metacorp* case, the appellant proceeded to prepare the revised tax computation for Y/A 2010 to follow the tax treatment in favour of the taxpayer applied in the cases of *Penang Realty* and *Metacorp*. Based on the revised tax computation, the appellant had overpaid RM8,488,375 in income tax.
>
> (xxiii) *The appellant then filed an application under* s 131 of the ITA as there was a

mistake and Forms N and Q would not be applicable. (Emphasis added.)

[31] In declining to give effect to the statutory scheme put in place by Parliament to deal with errors and mistake by the taxpayer under s 131(1) of the ITA, the respondent at the material time and the majority SCIT relied on s 131(4) of the ITA whereby the appellant's tax return for YA 2010 is said to have been prepared in accordance with 'the practice of the Director General generally prevailing during at the time when the return or statement was made' and therefore, the relief sought by the appellant cannot be granted.

[32] The burden is on the respondent to prove the existence or pre-existence of any 'practice of the Director General generally prevailing' failing which the respondent's reliance on s 131(4) of the ITA collapse. This court finds that the respondent fails to prove that in YA 2010 there was a *general prevailing practice of the Director General* to subject gains arising from compulsory acquisition of land to income tax and the appellant's tax return for YA 2010 was in fact made in accordance with that particular *generally prevailing practice* and not in reliance of anything else.

[33] In determining what amounts to 'practice of the Director General generally prevailing', this court is guided by the word 'practice' defined in *Shorter Oxford English Dictionary* (6th Ed) Vol 2 which amongst others to mean:

> The habitual doing or carrying out of something; usual or customary action or performance; action as opp. To profession, theory, knowledge, etc ... A custom; a habit; a habitual action.

[34] Nowhere in the CS the SCIT made any finding of fact relating to the existence of any 'practice of the Director General generally prevailing' relating to compulsory acquisitions at the time when the appellant's tax return for YA 2010 was filed. This court finds that the DIS merely contains the respondent's view on *Penang Realty* (Court of Appeal decision) case and not the practice of the respondent. Reliance cannot be made on the evidence of the respondent's witness RW1, who was at the material time a junior officer of the respondent who joined the Inland Revenue Board ('IRB') in 2008. Her evidence fail to reflect the purported practice of the respondent's generally prevailing.

[35] Nonetheless, even if there is such a practice, it cannot be contrary to the law as that would defeat art 96 of the Federal Constitution which states that no tax shall be levied other than through the Federal law. The respondent cannot have a practice contrary to the ITA which is a Federal law.

[36] It is interesting to note the effect of the DIS. It is not disputed that there were three DIS issued in the year 2007. Appellant's witness AW2 was only familiar with the contents of the DIS herein. The DIS herein was issued by the respondent sometime in February 2007 which was after the Court of Appeal's decision in the *Penang Realty*'s case on 20 April 2006. There was never any DIS issued prior to or after 2007. There was no explanation as to why only in 2007 the three DIS were issued. Where the DIS in the present matter is concerned, if indeed there was a practice then there is no necessity to issue a DIS. Another question arises here; is the respondent authorised to issue a DIS? Nowhere in the ITA that states as such. The ITA only empowers the respondent to issue public rulings under s 138A of the ITA which states that:

> The Director General may at any time make a public ruling on the application of any provision of this Act in relation to any person or class of persons, or any type of arrangement.

[37] Every public ruling that is issued by the respondent (including the add end urns) is prefaced by the following 'clarification':

> A Public Ruling as provided for under section 138A of the Income Tax Act 1967 is issued for the purpose of providing guidance for the public and officers of the Inland Revenue Board. *It sets out the interpretation of the Director General of Inland Revenue in respect of the particular tax law, and the policy and procedure that are to be applied.*
>
> A Public Ruling may be withdrawn, either wholly or in part, by notice of withdrawal or by publication of a new ruling which is inconsistent with it. (Emphasis added.).

[38] It is the finding of this court that not only the DIS does not constitute 'practice of the Director General generally prevailing' under s 131(4) of the ITA, the respondent does not have any power to issue the DIS under the ITA, in the first place. The DIS is therefore illegal and invalid in law. In this regard there is the principle of interpretation; *expressio unius est exclusion alterius;* which means that the express mention of one thing implies the exclusion of another thing not so mentioned which is applicable in the present matter.

[39] In *Jackson's Malaya Berhad v Penang Port Commission* [1973] 2 MLJ 27, Chang Min Tat J (as he then was) in holding that by-law 79 of the Penang Port Commission By-Laws 1957 was ultra vires the powers given by the Penang Port Commission Ordinance 1955 and was therefore void had explained as follows:

> *Expressio unius est exclusio aiterius*. On this principle of interpretation, I must necessarily hold that *if it was the intention of Parliament to permit the Commission to limit its liability for loss of or damage to goods in its custody, such an intention would be expressed specifically in a section in this part of the Ordinance, and that since there is none, by-law 79 made under s 66 of the Ordinance in Part V, Duties and Powers of the Commission is, if purporting to limit its liability, ultra vires the Ordinance* ...
>
> I am consequently of opinion that there is no authority in the Penang Port

Commission Ordinance permitting the Commission to restrict its liability for goods received into its custody and particularly it has no powers under s 66 to do so. (Emphasis added.)

[40] In applying the same principle the Federal Court in *Ng Siew San v Menaka* [1973] 2 MLJ 154, held:

Lord Dunedin in the same case said at p 527: The upshot of the matter seems to me that each statute must be judged of by itself. Now in the present statute we find a direct prohibition as to contracts in s 2(1)(c). 'A moneylender shall not enter into any agreement in the course of his business as a moneylender with respect to the advance and repayment of money, or take any security for money in the course of his business as a moneylender otherwise than in his registered name.

It seems to me that express enactment shuts the door to further implication. 'Expressio unius est exclusio alterius.'

... I think registered name means de facto registered name, and that it would be contrary to all justice to penalise the appellants for what was really a mistake of the Inland Revenue ...

We should adopt the line taken in that case. By accepting the contention of the appellant, we would in effect be penalising the respondent for defective draughtsmanship of our Ordinance. (Emphasis added.)

[41] The same principle was accepted and applied by the Federal Court in *Jamaluddin bin Mohd Radzi & Ors v Sivakumar a/l Varatharaju Naidu (claimed as Yang Dipertua Dewan Negeri Perak Darul Ridzuan), Election Commission, intervener* [2009] 4 MLJ 593.

[42] If Parliament had intended to authorise the respondent to issue the DIS, such an intention would have been expressed specifically in the ITA. Section 138A of the ITA does not extend to cover DIS. In the absence of such provision, not only the DIS is ultra vires the ITA, it confirms that the respondent does not have the power to issue the DIS in the first place. The respondent cannot seek to collect taxes under an imperative edict such as a DIS coupled with a sanction for non-compliance which is not legislated and does not come within the province of Parliament or delegated by Parliament.

[43] This court agrees with the appellant's submission that the DIS is illegal and invalid in law and cannot constitute 'practice of the Director General generally prevailing' under s 131(4) of the ITA to begin with. This court is further compounded by the fact that even the DIS confirmed that it is merely a statement setting out the respondent's view and position on the *Penang Realty* (Court of Appeal) case. It is stated in the DIS that:

This document is not public ruling, but provides a statement of the Director General of Inland Revenue position in relation to the said decision and how the law will be administered as a consequence of the decision. (Emphasis added.)

[44] The evidence led by the respondent's witness RW1 does not assist the respondent as well since RW1 during cross examination stated that the word 'amalan' means what the IRB practises based on the provisions of the ITA whereas the word 'pendirian' means a statement from the IRB and the IRB will stand firm on that statement so long there are no amendments made to the ITA. RW1 confirms that 'amalan' is different from 'pendirian'. Practice is clearly different from 'view' or 'position'.

[45] Since no evidence have been adduced by the respondent to show the existence of any 'practice of the Director General generally prevailing', the respondent's reliance on s 131(4) of the ITA to deny the appellant's s 131 of the ITA application is therefore rejected.

[46] This court finds that the majority SCIT fell into error because their findings of facts contradict their conclusion. Instead, the minority SCIT was in fact correct in finding that:

> (viii) Berdasarkan fakta yang dibuktikan, saya berpandangan, *DIS yang dikeluarkan oleh responden tidak boleh disamakan dengan apa yang dinyatakan di dalam subseksyen 131(4) ACP sebagai 'practice of the Director General generally prevailing' kerana tiada bukti bahawa DIS tersebut merupakan satu amalan oleh Ketua Pengarah sebaliknya ia diakui merupakan pandangan dan penjelasan di pihak Ketua Pengarah berkaitan dengan keputusan Penang Realty ...* (Emphasis added.)

[47] More importantly, if any purported 'generally prevailing practice' exists, such practice cannot override or defeat binding Superior Court decisions. In *JM Gomes & Co v Saurajen Visva Nathan* [1954] 1 MLJ 3 the court had held:

> ... even if there was evidence of the existence of such a practice (and there was no such evidence before the learned President), such a practice could not override the express provisions of the rule as to the filing and service of the defence two days before the return date of the summons.

[48] In *Atwood and Others v Sellar & Co* (1879) 4 QBD 342, it was held:

> If a custom prevailing in a court, which, though an inferior court, is still a court of law, if inconsistent with law cannot prevail, surely the same rule must apply to a practice of average adjusters. When a practice of this kind is brought to the test of legal decision and is found to be erroneous and inconsistent with law, it cannot be permitted to override the law and acquire the force of law.

[49] The respondent fails to provide any legal reasoning other than s 24(1) of the ITA (which is not applicable by virtue of the *Metacorp* case) to support the same in light of binding Superior Court decisions in *Penang Realty* and *Metacorp* which were clearly in favour of taxpayers. The holding of the appellant's overpaid RM8m in taxes by the respondent contradicts art 96 of the Federal Constitution which provides:

No tax or rate shall be levied by or for the purpose of the Federation except by or under the authority of federal law.

[50] The respondent should not be allowed to apply s 131(4) of the ITA in a manner which would contradict binding Superior Court decisions like *Penang Realty* and *Metacorp* and the law. The DIS of the respondent cannot be of a higher status than subsidiary legislation or the law and/or the Federal Constitution.

[51] The minority SCIT was correct in law in holding that:

(viii) ... Dalam hal ini, perlu diingatkan bahawa Mahkamah Tinggi dalam kes *Metacorp* menyatakan bahawa kegagalan Ketua Pengarah mematuhi keputusan kes *Penang Realty* menjadikan keputusan Ketua Pengarah cacat. *Oleh itu saya berpandangan bahawa DIS yang dibuat oleh Ketua Pengarah tidak boleh mengenepikan atau bertentangan dengan keputusan Mahkamah Rayuan di dalam kes Penang Realty dan Metacorp.* (Emphasis added.)

[52] *Metacorp* is a judicial review case and went up on appeal to the Court of Appeal. *Penang Realty* case was an appeal from the SCIT that went up to the Court of Appeal. In *Metacorp*, the respondent had refused to accept the *Penang Realty*'s decision and as such the taxpayer in *Metacorp* went straight for judicial review as there was in existence a binding precedent that the respondent refused to follow. The High Court and the Court of Appeal ruled that judicial review was the correct mode of application as there was illegality in the respondent's decision and found in favour of the taxpayer therein. In *Metacorp*, the court decided that the compulsory acquisition was to be subjected to real property gains tax.

[53] In considering whether s 24 of the ITA should have been considered in *Penang Realty* by the Court of Appeal, Rohana Yusuf J (as Her Ladyship then was) had held that s 24 of the ITA had no relevance at all in the case of *Penang Realty*. The learned judge stated:

[22] Even the treatment of gross income based on debt owing under s 24 requires that the stock-in-trade sold, or which is compulsorily acquired must be one in the course of carrying on a business. *However there was no necessity for the Appeal Court to refer to s 24 in the Penang Realty because in my view s 24 has no application in that case and it is not proper therefore for the respondent to ignore the decision of the Court of Appeal on that basis.*

[23] Back to the present case, the facts of this case are not in dispute, the applicant's land was compulsorily acquired. The land was stock-in-trade of the applicant. The compulsory acquisition was not in the course of carrying on a business in the sense of F Housing. Therefore there would be element of compulsion which vitiated intention to trade.

[24] *Thus the failure of the respondent to follow the decision of the Superior Courts in*

A *Penang Realty as well as Lower Perak renders its decision defective. These two cases are binding authorities on the respondent, being an arm of the executive. Also based on doctrine of stare decisis this court is also bound by the decisions of the Superior Court. Since the respondent's decision is not based on legal authorities of the Superior Courts such decision is in excess of its authority.* (Emphasis added.)

B

[54] It is crystal clear from the above that there was no necessity at all for the Court of Appeal to consider s 24(1)(a) of ITA in *Penang Realty* and that the respondent's position in the DIS was erroneous and unnecessary. This court cannot disagree with the appellant's contentions that the respondent's DIS C disregarded judicial precedent and caused untold confusion to taxpayers and good corporate citizens as it had put taxpayers in a position of conflict between the respondent and what they thought they understood of *Penang Realty*.

D **[55]** Interestingly a new s 4C was introduced into the ITA which took effect for YA 2014 onwards. This new provision in the ITA clearly illustrates that the position taken by the respondent in the DIS was a mistake. The new s 4C provides as follows:

> Gains or profits from a business arising from stock in trade parted with by any E element of compulsion.
>
> 4C. For the purpose of para 4(a), *gains or profits from a business shall include an amount receivable arising from stock in trade parted with by any element of compulsion including on requisition or compulsory acquisition or in a similar manner.* (Emphasis added.)

F

[56] It is of the considered view that the amendment is fatal to the respondent's case. It is clear from the language of s 4C of the ITA above, the respondent has codified its own failed view as the position for future year of assessments. Their delay in doing the amendment had caused prejudice to the G appellant.

[57] Apparently a similar situation also arose with the introduction of s 4B into the ITA whereby the respondent has codified its own argument that interest received by taxpayers could not be regarded as business income under H s 4(a) of the ITA and the High Court has held such codification to be fatal to the respondent's case for prior year of assessments in the case of *PETRONAS Penapisan (Terengganu) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (R2–14–23 of 2011) (unreported) ('PPTSB'). The High Court had held:

I

> On another perspective, it is noted that their Lordship had observed in *American Leaf* that there is room for overlapping between one para and another in s 4. This overlapping had caused ambiguity and the benefit of such ambiguity weighs in favour of the taxpayer. This ambiguity is further reinforced by the fact that the law has been amended to state categorically this issue, in clause 5 of the Finance Bill

2012. The Finance Bill seeks to introduce a new s 4B into the ITA, which will have effect for year of assessment (Y/A) 2013 and subsequent Y/As under clause 3(4) of the Finance Bill 2012.

It is clear that but for the proposed s 4B, that s 4(a) of the ITA includes interest as per *American Leaf, PCEO* and *isyoda*.

As earlier stated the Revenue had relied upon the *Nilai Cipta* and *AVOS* and argued that the interest received by the appellant from the Placements could not be regarded as business income under s 4(a) ITA. It is clear from the language of the proposed s 4B that the Revenue seeks to codify this position or argument for future Y/As. *Whilst the enactment of a new s 4B in the ITA is strictly within the powers and functions of the Legislature, I agree with the appellant's contention that the proposal to introduce the above s 4B into the ITA for Y/A 2013 and subsequent Y/As is fatal to the Revenue's case in the instant appeal for Y/As 2003 and 2004 right up to Y/A 2012.* (Emphasis added.)

[58] It is therefore clear that whilst the enactment of a new s 4C in the ITA is strictly within the powers and functions of the Legislature, the proposal to introduce the above s 4C into the ITA for YA 2014 and subsequent year assessments is fatal to the respondent's case in the instant appeal for YA 2010. It is abundantly clear that the new s 4C of the ITA is meant to apply prospectively ie from YA 2014 onwards and the legal principle postulated by the Superior Courts in *Penang Realty* and *Metacorp* that the gains arising from the compulsory acquisition of land should not be subject to income tax for the prior year of assessments has always been correct and finally accepted by the respondent. Therefore there is no reason for the appellant's appeal herein not to be allowed.

[59] In *DR Fraser and Company, Limited v Minister of National Revenue* [1949] AC 24 (on appeal from the Supreme Court of Canada), Lord MacMillan in the Privy Council pointed out that:

When an amending Act alters the language of the principal statute, the alteration must be taken to have been made deliberately. *In tax legislation it is far from uncommon to Find amendments introduced at the instance of the revenue department to obviate judicial decisions which the department considers to be attended with undesirable results.* (Emphasis added.)

[60] The Federal Court had adopted and applied the above authority in *Director General of Inland Revenue v CKK* [1974] 2 MLJ 104 and is therefore a binding aspect of Malaysian tax law.

[61] It is apparent that the legislative amendment ie s 4C of the ITA statutorily requiring taxpayers to bring their gains arising from the compulsory acquisition of land to tax under the ITA is to reverse *Penang Realty* and *Metacorp* for YA 2014 onwards. This in turn shows that the decisions in *Penang*

Realty and *Metacorp* represent the correct law prior to YA 2014. The amendment is therefore fatal to the respondent's position in the instant case.

[62] It must be noted that there was no DIS issued by the respondent after the *Metacorp* case. The majority SCIT then found as facts proved that the appellant has decided to give the benefit of the doubt to the respondent and relied upon the respondent's DIS, at that point of time when filing the tax return for YA 2010 as the appellant believed that its decision was correct and hence there was no need to file Form Q or Form N. In other words, in 2011, in wanting to be a good corporate taxpayer, the appellant had looked into what the situation was at the material time and complied with the DIS and this is where the appellant was 'punished' with by the respondent. Before this court, the respondent argues that because the appellant had followed what was stated in the DIS, there is therefore no mistake. The appellant is argued to have been 100% sure in following the DIS and therefore the appellant cannot benefit from the decision in *Metacorp*.

[63] Here is the situation where a corporate taxpayer who is not a court of law had filed a tax return with a certain deadline under the law by which they have to file a tax return. As the deadline was approaching, they discovered the DIS. They are not legal people and as such they made a good faith decision to follow the respondent's decision in the form of the DIS. Obviously AW2 as a finance person knows what Form Q and Form N are all about and when one is following the respondent's interpretation one cannot be said to be aggrieved because one would think that the decision is correct.

[64] At this juncture, this court must state its observation on the respondent's conduct. Vide para 3 of the respondent's letter dated 23 September 2014, the respondent informed the appellant that if the appellant is not satisfied with their decision in rejecting the appellant's s 131 ITA application, the appellant would have to submit a written request to the respondent within six months to forward the application to be heard by the SCIT. The relevant para of the said letter is reproduced:

> Sekiranya pihak tuan tidak berpuas hati dengan keputusan ini, pihak tuan hendaklah dalam tempoh masa 6 bulan daripada tarikh surat ini membuat permintaan supaya permohonan rayuan tuan dikemukakan kepada PKCP.

[65] This court agrees with the appellant's submission that the respondent's response clearly falls under s 131(5)(a) of the ITA which reads as follows:

> the applicant may within six months after being informed of the decision request the Director General in writing to send the application forward to the Special Commissioners ...

[66] Accordingly, based on the contents of para 3 of the respondent's letter dated 23 September 2014, the appellant was told that there was no further avenue to go back to the respondent for clarification or appeal. It is therefore clear that the appellant has again given the benefit of the doubt to the respondent and complied with the procedure as stated in para 3 of the respondent's letter dated 23 September 2014 by writing to the respondent on 29 December 2014 to request the respondent to forward the appellant's s 131 ITA application to be heard by the SCIT.

[67] AW1 confirmed that there was no mention or reference in the respondent's letter dated 23 September 2014 that there was any room for clarification or further negotiation with the respondent and that there was also no letters from the respondent which referred to Form N of the ITA.

[68] It is highlighted to this court that however, during the hearing of this case, the respondent has unconscionably sought to shift his position as RW1 had stated that:

(a) the appellant was not required to comply with procedure stated in para 3 of the respondent's letter dated 23 September 2014; and

(b) the appellant should have filed a Form N under s 100 of the ITA to apply for extension of time to appeal by way of Form Q instead of filing an application under s 131 of the ITA.

[69] It is the finding of this court that the respondent has sought to mislead the appellant vide para 3 of its letter dated 23 September 2014 and acted inconsistently with what they have stated earlier in that letter. The appellant became a 'victim' by giving the benefit of the doubt to the respondent again and again. It is pertinent to note that the respondent never denied that the appellant had given the respondent the benefit of the doubt on numerous occasions.

[70] It could be gleaned from the above facts and observation that the respondent's 'wrong procedure' argument is clearly an afterthought and taken in bad faith as they have been inconsistent in their stand in regard to the procedure to be adopted.

[71] The respondent should not be allowed to act inconsistently, arbitrarily and to blow hot and cold (see: *S Singaram v Fong Peck Moi & Anor* [1976] 1 MLJ 237).

[72] This court further agrees with the appellant's submission that as a responsible statutory body and tax collection agent of the Government under s 10 of the Inland Revenue Board of Malaysia Act 1995, the respondent and the IRB of Malaysia should deal with the substantive issues in respect of the

appellant's tax liability and not rely on vague or obscure procedural means to refuse to look at the substantive issues in dispute or obfuscate the real issues.

[73] It is further clear that the SCIT had made finding of fact that there was a mistake on the part of the appellant. Mistake is something that one does not know that it was a mistake at the material time. Mistake will only be known later. The SCIT then made a finding of fact/proved fact that Form Q and Form N were not in question because the appellant believed that their decision to follow the DIS was correct and that the respondent's view in the DIS was a mistake (see para (xxx) of the CS). Yet, the SCIT finally found that the appellant should have filed Form Q and Form N. This is where the majority SCIT had erred wherein they have gone beyond the facts proved.

[74] The respondent's witness, RW1 admitted during cross-examination that although the Superior Courts in *Penang Realty* and *Metacorp* have held that gains arising from the compulsory acquisition of land should not be subject to income tax, she had nevertheless made a 'remarkable' statement that the respondent and the staffs of IRB must comply with the provisions of the ITA (reference to s 24(1) of the ITA) by hook or crook and that they need not follow the decisions of the Superior Courts and can disregard the same.

[75] Lower courts and tribunals are bound by the decisions of the Superior Courts. In *Co-operative Central Bank Ltd v Feyen Development Sdn Bhd* [1997] 2 MLJ 829 the trite principle on the binding nature of judicial precedent/stare decisis was illustrated by Edgar Joseph Jr FCJ who had referred to the case of *Cassel & Co Ltd v Broome & Anor* [1972] AC 1027 and held as follows:

> And, in a famous passage (at p 1054D-E), Lord Hailsham concluded this part of the case by saying: The fact is, and I hope that it will never be necessary to say so again, that *in the hierarchical system of courts that exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in Young v Bristol Aeroplane Co Ltd* [1944] 1 KB 718 *offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom.* In our view, every word of what Lord Hailsham said regarding the status of judgments and relevance of precedent in the House of Lords, the circumstances, and the duty of the Court of Appeal to accept loyally the decisions of the House of Lords and the chaotic consequences which would follow should the Court of Appeal fail in this duty apply with full force, mutatis mutandis, to this country and we adopt what his Lordship said. Clearly, the Court of Appeal in *Harta Empat* flew in the face of the principles enunciated by Lord Hailsham and we can only express the hope that it will not be necessary for the Federal Court hereafter to have to remind the Court of Appeal of those principles. (Emphasis added.)

[76] In *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1, the Federal Court discussed at length the doctrine of judicial precedent in the

followings:

> The doctrine of stare decisis or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal.

[77] In the recent tax case of *PPTSB* the High Court had held:

> In the final analysis in my judgment, *the SCIT had erred in not adhering to the binding precedent. The decision by SCIT is a disregard of the doctrine of judicial precedent for failure to apply the Privy Council decision in American Leaf and the Court of Appeal decision in PCEO.* (Emphasis added.)

[78] In the absence of any appeal taken up by the respondent relating to the matter herein, this court (and the majority SCIT in the instant case for that matter) is clearly bound by the decisions of *Penang Realty* and *Metacorp* as well as numerous other authorities cited herein as these authorities cannot be disregarded.

[79] The majority SCIT has erred in law in holding that the respondent can deny the appellant relief under s 131 of the ITA even if that contradicts binding Superior Court decisions like *Penang Realty* and *Metacorp* and violates the doctrine of judicial precedent.

[80] On the strength of the binding Malaysian cases cited in the above the respondent's and the majority SCIT's decisions are clearly perverse.

[81] It is pertinent to note the dicta of Edgar Joseph Jr FCJ in the Supreme Court case of *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105. The learned judge had correctly reminded that:

> ... The court should bear in mind the possibility of arbitrary or incorrect assessments, brought about by fallibility officers who have to fulfil the collection of a certain publicly declared targeted amount of taxes and whose assessments may be influenced by the target to be achieved rather than the correctness of the assessments.

[82] The appellant is entitled to the relief sought under s 131(1) of the ITA as to deny them of such relief would tantamount to allowing unjust enrichment by the respondent. As Gopal Sri Ram JCA (as he then was) in *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265 had held:

A

> ... As demonstrated earlier, both principle and authority lie in favour of the grant of relief that prevents unjust enrichment by Allied as wrongdoer. In our judgment, no technical argument ought to be permitted to stand in the way of righting the wrong done to the respondents.

B

[83] In addition, Lord Hoffmann in *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners and the Attorney General* [2007] STC 1 held:

> ... But I see no reason to infer that Parliament intended to exclude a common law remedy in all cases of mistake (whether of fact or law) in which the Revenue was unjustly enriched ...

C

[84] The Federal Court in *Dream Property Sdn Bhd v Atlas Holding Sdn Bhd* [2015] 2 MLJ 441 in alluding to the principle of unjust enrichment had stated:

D

> ... the highest courts have now conclusively recognised that unjust enrichment is a distinct source of rights and obligations in English private law that ranks alongside contract and civil wrongs in importance and accordingly calls for discrete stand-alone treatment ...
>
> In our view the time has come for this court to recognise the law of unjust enrichment by which justice is done in a range of factual circumstances, and that the restitutionary remedy is at all times so applied to attain justice.

E

[85] In the upshot, the respondent in defiance of the doctrine of judicial precedent had wrongly used s 131(4) of the ITA to override and disregard binding Superior Court decisions and had deprived the appellant of the overpaid taxes of RM8,488,375. The respondent had wrongly treated the DIS as falling within the meaning of a 'practice of the Director General generally prevailing' under s 131(4) of the ITA when no evidence of such practice existed prior and/or at the material time. The fact that Parliament only allows the respondent to issue public rulings under the law, any practice of the respondent to be applied or generally prevailing can only be made by such mode. However, instead of using the allowed and define route, the respondent decided to create a 'creature' called DIS which is illegal and misleading.

F

G

H

[86] This court finds that the respondent has acted in bad faith by resorting to various procedural means to deny the appellant of their entitlement under s 131(1) of the ITA. The respondent's interpretation of s 134(4) of the ITA is far from being logical and rational as there cannot be a 'generally prevailing practice' contrary to the law.

I

CONCLUSION

[87] Premised on the above, the appellant's appeal was allowed with costs.

Appeal allowed.

Reported by Ashok Kumar